

Dang (Migration) [2021] AATA 2847 (7 June 2021)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Ms Thi Trang Dang Ms Thi Chi Tran Ms Thi Hoi Tran Mr Van Minh Tran
CASE NUMBER:	1803484
HOME AFFAIRS REFERENCE(S):	CLF2013/150915 CLF2017/68828 OSF2012/031173
MEMBER:	Russell Matheson
DATE:	7 June 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Residence) (Class BS) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 801 (Spouse) visas: • Public Interest Criterion 4020 for the purposes of cl 801.226 of Schedule 2 to the Regulations.

Statement made on 07 June 2021 at 10:45am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa - subclass 801 (Spouse) – incorrect information – family link with sponsor’s previous wife – sister of applicant’s first husband – first applicant estranged from sister – applicant unaware of ex-sister-in-law’s marriage – applicant met sponsor as a divorced man – decision under review remitted

LEGISLATION

Migration Act 1958, s 65

Migration Regulations 1994, Schedule 2, cl 801.226, Public Interest Criterion (PIC) 4020.

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 2 February 2018 to refuse to grant the applicants Partner (Residence) (Class BS) visas under s 65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas on 28 June 2013. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 801.226 of Schedule 2 to the *Migration Regulations 1994* (the Regulations) because the delegate found that the visa applicant had provided information that was false or misleading in a material particular in respect of the visa application and did not meet Public Interest Criterion (PIC) 4020. The applicant seeks review of the delegate's decision.
6. The applicants appeared before the Tribunal on 3 June 2021 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
7. The applicants were represented in relation to the review by their registered migration agent.
8. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

9. Background

10. The primary applicant (the applicant) lodged an application for a Partner (Temporary) (Class UK) (Subclass 820) visa and a Partner (Residence) (Class BS) (Subclass 801) visa on 28 June 2013, on the grounds of being in a spousal relationship with an Australian citizen (the sponsor) who lodged a sponsorship in support of the application. On 3 July 2013, the applicant and the secondary applicants were granted a subclass 820 visa. The applicant's (Subclass 801) visa was subsequently refused on 2 February 2018.
11. In the decision, the delegate raised a number of concerns relating to significant aspects of the relationship between the applicant and sponsor, including information relating to the sponsor's social media and a purported relationship between the sponsor and the applicant's former sister-in-law, Ms Nina T.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 801.226 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
13. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in a material particular?

14. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
15. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
16. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
17. The applicant in her written submission states that she was previously granted two visas based on her relationship with the sponsor - a Prospective Marriage (Subclass 300) visa and a Partner (Temporary) (Class UK) (Subclass 820) visa. She submits that appropriate weight ought to be afforded to these circumstances, as the Department itself had granted the Applicant these visas based on evidence and proof of her existing and genuine relationship with the sponsor at the time. The Tribunal accepts the applicant has been granted two previous visas based on the evidence provided.
18. At the hearing the applicant when questioned acknowledged the basis for the Delegate's decision being that the Applicant failed to satisfy PIC 4020 in light of the allegedly conflicting or misleading information relating to the Applicant's relationship with the sponsor, as well as the sponsor's relationship with his ex-wife (Nina). The Tribunal questioned the applicant as to why she had concealed her family connection with her sponsor from the Department. The

applicant responded that the sponsor had divorced his first wife and she was not aware the sponsor's first wife was the sister of her first husband. She further stated that it was simply a mistake and not intentional when completing the application form and that her first husband was estranged from his sister Nina and that she had never visited them in Vietnam and all that she knew was that his sister had married someone overseas. The applicant also said that she had only met Nina her first husband's sister when she was a 14-year-old in Vietnam and had no idea who she had married at a later date and she had no contact with her at any stage during her relationship with her first husband. The Tribunal questioned the applicant's knowledge of her sponsor maintaining a relationship in Australia with his first wife as indicated on social media. The applicant stated that she was not aware her sponsor was in a relationship with his first wife and her relationship with the sponsor was completely independent of his relationship with his ex-wife and that she had no knowledge of his former relationship prior to entering into a relationship with him. The applicant maintained that she met the sponsor by coincidence at her sister's tailor shop in Vietnam in 2010 and he had been divorced since 2002. The applicant claims that she had no intention of providing misleading information to the Department regarding the circumstances of her relationship with the sponsor. The Tribunal found the applicant's evidence consistent and her explanation to be credible as to the circumstances as to why she did not declare her family connection with the sponsor. The Tribunal is of the view the non-declaration made by the applicant is minor in nature and is not information that is false or misleading in a material particular as defined in PIC 4020(5).

19. The Tribunal was provided information by the applicant that her relationship has ceased with the sponsor and she has made a claim of family violence against the sponsor. The Tribunal acknowledges that the applicant's relationship with sponsor has ceased and she has made a non-judicial claim of family violence. The Tribunal did not assess the applicant's relationship due to the limited information before the Tribunal regarding the circumstances of her relationship and whether her relationship would have continued but for the family violence being perpetrated against her by the sponsor.
20. Therefore, the applicant **meets** PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

21. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
22. There is no evidence that a visa was previously refused based on a failure to satisfy PIC 4010(1). Therefore, PIC 4020(2) does not apply

23. Has the applicant satisfied the identity requirements?

24. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The visa applicant's identity documents had been provided with the application. No issue with her identity has been raised by the delegate. The Tribunal is satisfied that the applicant meets PIC 4020 (2A).

Has a visa previously been refused based on a failure to satisfy PIC 4020(2A)?

25. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A)

during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).

26. There is no evidence the applicant or any member of her family unit had been refused a visa because of a failure to satisfy the identity requirement.
27. There is no evidence to suggest the applicant does not meet PIC 4020(2B) and therefore the Tribunal is satisfied it is met.

28. **Conclusion**

29. Based on the above, the applicant does satisfy PIC 4020 for the purposes of cl.801.226 at the time of decision.

DECISION

30. The Tribunal remits the applications for a Partner (Residence) (Class BS) visas for reconsideration, with the direction that the first named applicant meets the following criteria for a Subclass 801 (Spouse) visas:
 - Public Interest Criterion 4020 for the purposes of cl.801.226 of Schedule 2 to the Regulations.

Russell Matheson
Member

31.

Russell Matheson
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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